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E. ROBERT SEAVER,

IN THE

# SUPREME COURT OF THE UNITED STATES

No. ——— 71-477

FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*Identification of Parties:* Throughout this Petition, the parties are designated as they were in the opinions of the courts below:

Petitioner : Church
Respondent: Insurance Company

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All forms of emphasis used in this Petition have been added by the authors, unless otherwise specifically indicated.

IN THE

# SUPREME COURT OF THE UNITED STATES

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No. ———

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FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

---

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered 8 June, 1971, petition for rehearing denied 9 July, 1971.

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## OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio, Western Division, is not reported and is printed in Appendix A hereto. The opinion of the Court of Appeals for the Sixth Circuit is not yet reported and is printed in Appendix B; the order of the Court of Appeals denying rehearing is printed in Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered 8 June, 1971, petition for rehearing denied 9 July, 1971.

Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

## STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Rule 19 (1) of the Rules of the Supreme Court of the United States, which provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> '(a) * * *
>
> '(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or *has decided an important state or territorial question in a way in conflict with applicable state or territorial law;* or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or *has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.*"

## QUESTIONS PRESENTED

A fire insurance policy covering the church property was issued in an amount recommended by the insurance company as being the full insurable value of that property. A partial loss subsequently occurred and arbitration determined that the amount recommended by the insurer as the face amount of the policy was actually only 67% of the full

value of the property and that the partial loss exceeded the face value of the policy. The insurer invoked the coinsurance clause of the policy and paid only a portion of the face amount of the policy, taking the position that such was the extent of its liability as the face amount of the policy was insufficient to comply with the 90% coinsurance clause. The church sued in the Ohio courts to recover the difference between the sum paid and the face amount of the policy. The case was removed to the District Court as a diversity case. The District Court held that under Ohio law the insurer was estopped to question the correctness, for coinsurance purposes, of the face amount of the policy. The Court of Appeals, by a 2-1 vote, reversed. The questions presented are:

1. In a diversity case, may the Court of Appeals, *by a 2-1 majority,* overturn the conclusion of the District Court upon the status of the law of the state in which it sits where such conclusion is consistent with the case law of that state?

2. Is the insurance company, under the law of Ohio, estopped to invoke the coinsurance provisions of the policy?

## STATEMENT

The basic facts of this case, which are not in dispute, are as follows:

The insurance company (respondent) appraised the church property and represented to the church (petitioner) that the full insurable value of such property was $570,000 and recommended that figure as the face amount of a proposed fire insurance policy. The church relied on such representation and recommendation and purchased the policy with $570,000 as the face amount. Included in the policy was the following 90% coinsurance provision:

"This Company shall not be liable for a greater pro-

> portion of any loss or damage than the amount hereby insured bears to the percentage specified on Page 1 of the actual cash value of the property at the time of loss, nor for more than the proportion which this policy bears to the total insurance thereon."

Approximately one year later, the church buildings were partially destroyed by fire. The parties were unable to agree on the amount due under the policy and arbitration was invoked. The arbiters fixed the total value of the church property at $855,016.19 and determined the amount of the loss to be $574,935.36. The conclusions of the arbitration panel were binding on both parties.

The church claimed $570,000.00, the face amount of the policy. The insurer, however, invoked the 90% coinsurance clause of the policy, taking the position that as the face amount of the policy was less than 90% of the total value, the property was under-insured and, therefore, the church was obliged to assume a proportionate share of the loss. The company paid $425,807.28. The church sued in the Ohio courts to recover the difference between the amount paid and the policy limit. The case was removed to the District Court on the basis of diversity of citizenship.

The District Court applied the doctrine of equitable estoppel, holding that under Ohio law, the insurance company was estopped from invoking the coinsurance clause of the policy. The District Court held:

> "We do hold, however, that where an insurer does make its own appraisal, 'proposes' to the insured that it is the '100 percent' value in connection with a 90 percent coinsurance 'proposal' (Plaintiff's Exhibit 10), participates in the determination of the 'limits' amount, and agrees with the insured that the amount is the correct one for 90 percent coinsurance purposes — we do hold that: First, the insurer has agreed that such value is in fact at that time the actual cash value

> of the property — or its full replacement cost; and second, that under the law of equitable estoppel, even though the conclusion of express oral agreement be discarded, the insurer is estopped to question the correctness of the inserted or limits amount for coinsurance purposes. Under either view the insured would be entitled to recover up to the limits amount."

Judgment was entered in favor of the church for $144,129.72, plus interest.

The Court of Appeals, by a 2-1 vote, reversed the District Court, holding that there could be no estoppel in Ohio in the absence of wilful or fradulent misrepresentation. The dissenting opinion agreed with the District Court that the Ohio law recognizes "estoppel *in pais* under which statements made in good faith may furnish grounds for estoppel":

> "Where, as here, the access to information is substantially greater on the part of one party and that party both creates the mistake and urges the opposite party to rely thereon to its ultimate damage, I feel that *Ohio law permits a court in equity to hold that the party basically responsible is estopped from taking advantage of its own mistake.*"

Petition for Rehearing was denied, again by a 2-1 vote, with the Court of Appeals ordering certain amendments to its original opinion.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it departs from established and accepted federal case law respecting the scope of review of the determination of local law by a District Court. In turn, the question is raised as to the weight to which the conclusion of the Court

of Appeals respecting such local law is entitled when it overrules the District Court by a majority of one, resulting in an even division among the Federal judges who have considered the status of the local law in this case.

Further, the decision of the Court of Appeals should be reviewed because its conclusion as to the status of the Ohio law conflicts with the established case law of that State.

## I.

Federal case law has established beyond question that the conclusion of a District Court as to the law of the state in which it sits shall be afforded preferred status by a Court of Appeals. The presumption is as to correct application of applicable state law or interpretation of state law by a federal trial judge in the absence of a controlling interpretation by the state courts.

The reasoned opinion of the trial court upon the status of the law of the local state within which it acts should be accorded *"great weight"* by the Court of Appeals and should not be overturned unless the Court of Appeals is *"clearly convinced"* that it is erroneous. *Madison County Farmers Association* v. *American Employers Insurance Co.,* 209 F. 2d 581. A Court of Appeals will not attempt to "outpredict, outforecast or outguess a trial judge with respect to a doubtful question of the law of his State." *Illinois Central Railroad Co.* v. *Stufflebean,* 270 F. 2d 801. The view of the trial court will be accepted unless the Court of Appeals is *convinced* that the trial court's determination was based upon *"clear misconception* or *misapplication"* of local law. *Brookwalter* v. *Phelps,* 325 F. 2d 186. The Court of Appeals will take the determination of State law by the trial judge as correct unless it is *"manifestly wrong." Denning* v. *Bolin Oil Co.,* 422 F. 2d 55.

The Court of Appeals for the Sixth Circuit, of course, applies the above-listed criteria with respect to questions

of local law. More particularly, however, the Sixth Circuit has consistently accepted the trial court's conclusion where it is a "permissible" one.

> "The rule appears well settled that in diversity cases, where local law is unsettled under state court rulings, if a federal district judge has reached a *permissible conclusion* upon a question of local law, *the Court of Appeals should not reverse, even though it may think the law should be otherwise.*" *Rudd-Melikian, Inc.* v. *Merritt.* 282 F.2d 924 (6th Cir., 1960).

> "We need decide only whether the District Judge reached a *permissible conclusion* in his determination of the local law." *Lee Shops, Inc.* v. *Schatten-Cypress Co.,* 350 F. 2d 12 (6th Cir., 1965).

In the case at bar, the District Court found that equitable estoppel under Ohio law prevented the insurance company from invoking the coinsurance clause of the policy. The case law of Ohio, as hereinafter reviewed, amply supports the conclusion of the trial judge. Certainly, the trial court was not "manifestly wrong" in concluding that, in Ohio, an equitable estoppel may arise from a representation made in good faith if it was intended and did cause another to act thereon. The decisions of Ohio courts "permit" such a finding. That the District Court was not "clearly" and "convincingly" in error in its application of Ohio Law is demonstrated by the fact that the Court of Appeals upset the trial court's ruling by a mere 2-1 vote.

*If the three distinguished judges of the Court of Appeals are unable to agree that a respected District Judge erred in his determination of local law, how can it be said that the Court of Appeals was "clearly convinced" that such determination was erroneous or that it was "manifestly wrong"?*

It is respectfully submitted that, if the large body of case law affording special consideration and weight to the

conclusions of District courts as to local law is to be meaningful and efficacious, such conclusions should not be overturned except by a unanimous decision of a three-judge Court of Appeals.

The decision of the Court of Appeals in overruling the conclusion of the District Court as to the application of local law in this case was a departure from established principles and exceeded the scope of review in that the decision of the District Court was a "permissible conclusion," in harmony with the case law of Ohio.

* * * * *

Petitioner recognizes that this Supreme Court normally follows the conclusion of a Court of Appeals on questions of local law. However, this general rule is not without qualification. In *Appalachian Power Co.* v. *American Institute of Certified Public Accountants,* (U.S.) 4 L. ed. 2d 492, 82 S.Ct. 585, this Court said, "This Court ordinarily accepts the determination of state law as found by the Court of Appeals, *particularly when * * * the same finding has been made by the District Court.*" Further, as Mr. Chief Justice Stone, dissenting in *Helvering* v. *Stone,* 317 U.S. 154, 87 L.ed. 154, said, "We have not wholly abdicated our function of reviewing such determinations of state law merely because courts of appeal have made them."

In *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 100 L.ed. 199, 76 S. Ct. 273, this Court reversed a Court of Appeals which had overturned the District Court's determination of local law, giving "special weight" to the trial judge's statement of the state law.

Petitioner respectfully submits that where, as here, the Court of Appeals and the District Court are not in agreement as to the local law, the conclusion of the Court of Appeals is not entitled to special weight and the Supreme Court should inquire into and determine the status of the

local law. *A fortiori* this Court should make such inquiry and determination where, as here, the Court of Appeals, in reversing the trial court, was less than unanimous.

As matters now stand, *the four federal judges who have ruled on this case have divided evenly on the issue of Ohio law*: two judges of the Court of Appeals have ruled that equitable estoppel does not apply; one Court of Appeals judge and the judge of the District Court (whose opinion is presumed to be correct and entitled to great weight) concluded to the contrary. It is respectfully submitted that this Supreme Court should determine the important question of Ohio law involved in this case and, further, that the respective preferences, deferences, presumptions and weights to which the conclusions of the different federal courts are entitled and how they are to be effectuated on review be determined by this Court.

## II.

The District Court found as a fact that the insurance company "suggested the insurable value which was asquiesced in and *as a matter of contract agreed on by the parties.*" The trial judge held that the insurer was, under equitable estoppel, estopped from repudiating that value by invoking the coinsurance clause of the policy. The Court of Appeals reversed, stating that no estoppel could arise under Ohio law because the insurance company's representation of value upon which the church relied was not fraudulent or intentionally misleading.

The two cases cited by the majority of the Court of Appeals differ significantly on their facts from the case at bar and do not involve misleading representation by the party sought to be estopped. In *New York Central R.R.* v. *General Motors Corp.*, 12 Ohio Ops. 2d 349, 182 F. Supp. 273, the court found: "There is no evidence that the plain-

tiff or any of its employees said or did anything to induce General Motors to install its manufacturing procedures * * *." Similarly, in *Flemming* v. *City of Steubenville*, 44 O.App. 121, 184 N.E. 701, the court noted: "Nowhere in this case do we find false or misleading statements or representations or inducements held out, or anything done on the part of the city to mislead these abutting owners to their prejudice." Obviously, neither of the cases cited in the majority opinion of the Court of Appeals applies to this case where the insurance company made specific proposals and recommendations to the church, which the church relied upon and which formed the basis of the *contract* between the parties.

The case law of Ohio provides ample precedent for the conclusion of the District Judge. An actual intent to mislead or defraud is not necessarily a prerequisite to the raising of an equitable estoppel. An equitable estoppel may arise from a statement made in good faith if it was calculated to and did mislead another who acted thereon in good faith and with reasonable diligence. 20 Ohio Jurisprudence 2d, *Estoppel and Waiver*, §§ 41, 42.

The scope of the Ohio law with respect to equitable estoppel is founded upon the principle announced by the Supreme Court of the United States in *Dickerson* v. *Colgrove*, 100 U.S. 578, 580, 25 L.ed. 618, and *Union Mutual Life Insurance Company* v. *Mowry*, 96 U.S. 544, 547, 24 L.ed. 674, quoted with approval by the Supreme Court of Ohio in *Trust Company* v. *Stevenson*, 114 Ohio St. 1, 13, 150 N.E. 726, and *Globe Indemnity Co.* v. *Wassman*, 120 Ohio St. 72, 165 N.E. 579:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that *he who by his language or conduct leads another to do what he would not otherwise have done, shall not sub-*

> *ject such person to loss or injury by disappointing the expectations upon which he acted.*"

That an innocent misstatement may give rise to an equitable estoppel was firmly established by the Supreme Court of Ohio in *Rosenthal* v. *Mayhugh*, 33 Ohio St. 155:

> "It is said that there was no fraud in Mrs. Mayhugh's representations that her husband was dead, because it does not appear she knew it was false. This was not necessary. *It is not necessary, to an equitable estoppel, that the party should design to mislead, it is enough if the act or declaration was calculated to and did in fact mislead another acting in good faith and with reasonable diligence.*"

In *Union Insurance Co.* v. *McGookey*, 33 Ohio St. 555, the agent of an insurance company issued a fire insurance policy which he was not authorized to issue without the company's approval. The Supreme Court of Ohio held the company was estopped to deny coverage, saying:

> "The evidence tends to show that whatever fault there was in the transaction, was wholly that of the agent, not of the insured, but of the company, and that the insured in good faith honestly performed all things by them to be done, to effect a valid insurance. If, then, either party must suffer from the mistake or fault of the agent, it must be the party whose agent he was; for an agent acting within the general scope of his authority binds his principal, notwithstanding he may have departed from his instructions, provided the party with whom he contracts had no knowledge of these instructions." Flander on Fire Ins., 174, 190.
>
> "It is an undoubted principle, that *whoever for the purpose of deriving a benefit in a transaction, by his acts or declarations induces another, who relies thereon, to change his position, is precluded from defeating*

*the transaction, by repudiating such acts or declarations;* for the law enforces the rule of good morals as a rule of policy, and estops a party from denying what can not be denied without a breach of good faith. *Beardsley* v. *Foot,* 14 Ohio St. 414; *Douglass* v. *Scott,* 5 Ohio 197."

The Ohio Supreme Court in *Callender, et al.* v. *Painesvill & Hudson R.R. Co.,* 11 Ohio St. 516, said:

*"However mistaken in fact, no person, whether artificial or natural, is permitted to so conduct and represent himself as to induce reasonable men, at his instance, to act upon the truth of such representations in their contracts and dealings with him, and to then deny the truth of such representations, to the prejudice of the parties so having relied upon them.*

"In order for the company, or any member thereof, to so repudiate its conduct, and disprove the truth of its own representations, it is necessary for it, not only to show an honest mistake, but that such mistaken representation had not induced the adverse party, in the exercise of reasonable prudence on his part, to give the credit, make the contract, and act under it in confidence of the truth of such conduct and representations."

* * * * *

"Under such circumstances, *to suffer the defendant to repudiate their first conduct, and deny the truth of their representations, by which the plaintiffs had been induced to contract with them, and upon which both parties had acted, would be in contravention of those principles of equity upon which the doctrine of estoppel rests,* and its operative effect to prevent fraud depends."

Equitable estoppel in Ohio was clearly summarized by the Ohio Supreme Court in *Morgan* v. *Spangler,* 14 Ohio St. 102, 119:

"The rule in reference to what are called estoppels in pais, is thus laid down in the leading case of *Pickard* v. *Sears,* 6 Ad. & Ell. 474: 'Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' This rule was qualified or explained in the case of *Freeman* v. *Cooke,* 2 Exc. 654, in which it was held that 'by the term willfully, in the rule, we must understand, at least, that the party means his representation to be acted upon, and that if it is acted upon accordingly.' In a recent case, the house of lords (*Jordan* v. *Money,* 5 H. L. Cas. 212), it was said by the lord chancellor, 'I think *it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time.* But if the party has *unwittingly* misled another, you must add that he has misled another under such circumstances, that *he had reasonable ground for supposing that the person whom he was misleading, was to act upon what he was saying.*"

See also *Douglass* v. *Scott,* 5 Ohio 194; *Beardsley* v. *Foot,* 14 Ohio St. 414; *Mutual Finance Co.* v. *Politzer,* 21 Ohio St. 2d 177, 256 N.E. 2d 606, 50 Ohio Ops. 2d 397; *Lake Front - East 55th St. Corp.* v. *Cleveland,* 21 Ohio Ops. 1, aff'd (App.) 36 N.E. 2d 196, 66 N.E. 2d 328 dismd for want of debat q 139 Ohio St. 138, 22 Ohio Ops. 127, 38 N.E. 2d 410, *Kelly, et al.* v. *Hazzard, et al.,* 96 Ohio St. 19.

## CONCLUSIONS

It is respectfully submitted that this petition for a writ of certiorari be granted.

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## APPENDIX A

---

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

Civil Action No. 6459

---

THE FIRST REGULAR BAPTIST CHURCH
OF FRANKLIN,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

---

EXCERPT OF PROCEEDINGS

(Court's Findings)

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BE IT REMEMBERED that on Wednesday, June 10, 1970, at 9:35 a.m., the above-styled action came on for further hearing in open Court before the Honorable Timothy S. Hogan, Judge of the United States District Court for the Southern District of Ohio.

• • •

[3] THE COURT: All right. Now, as you all know, in a district court we can't in a nonjury case do just like a jury and come back and say for the plaintiff so much or for the defendant. We are obligated for the purposes of review in an appellate court to state what the facts are

as the Court finds them to be and what the law is that we think applicable thereto, and then conclude it.

Customarily through the years that's called for a cessation of a trial at the conclusion of argument and then briefs and then rather formal findings of fact and conclusions of law. With the federal dockets the way they are throughout the country it's a luxury that we Americans can no longer afford.

Now, for the benefit of the laymen in this courtroom, that does not mean that this case has not been thoroughly gone into, not only by counsel but by this Court. We had an exhaustive pretrial in this case approximately a year ago, at which some of the questions in the case were disposed of and, for the record, those dispositions are affirmed again now.

Subsequent to the pretrial we pointed up the issues that were to be decided by this Court. Counsel on both sides have ably briefed this case. This Court has studied those briefs. So that while it may see somewhat [4] short shrift in a case involving $144,000, it's not as short as it might appear on the surface.

Now, the facts roughly are these as far as pertinent: A couple things took place at the church in 1964. At that time the church's insurance was divided insofar as agencies are concerned among two agencies, one known as the Meeker Agency and one known as the Morgan Agency. Both Meeker and Morgan had religious and other connections with the church.

The second thing that happened was an Educational Building was finished, and of course that called for construction insurance during the time it was being constructed. So, in any event, when that building was finished, the church's insurance was divided among two companies, two agencies. One of those agencies had its risks in eight

different companies, and there is nothing in this record on what the other one was.

Pretty nearly everybody in the insurance field that had any connection with the situation knew that the church was underinsured, including the board of trustees, and there had been some intimation of that as far back as 15 years before when somebody connected with an insurance company questioned the insurance at that time.

So that Meeker, who had the interest of the church and also of himself in mind, conceived the idea that it would be a good idea to consolidate all this insurance in one place as far as could be. And, unlike eggs, insurance [5] policies are not cheaper by the dozen; the more you can put in one policy, the cheaper it's going to be. So it was in the interest of the church to so do.

Meeker's company also at that time had recently, somewhat recently, issued a thing called a full replacement policy for property risks; and having the chance to do that complete consolidation with a new type of policy particularly, Meeker proposed to the pastor of the church that an effort be made to consolidate all the insurance.

There was mention made of this full replacement policy and he secured the pastor's permission to discuss the thing with Morgan, the idea being that they would consolidate the risk as much as they could in one company and bid on it, the two agencies; and if the risks covered by the two parties were competitive, as they turned out to be, the lower would be the successful bidder.

So both Meeker and Morgan, while they had the interest of the church at heart, they were also businessmen and they had a substantial adverse interest to the church, that being in earning a commission on whatever type of policy was sold because in the cards in a consolidation, either one of them stood to have more business than they had before.

Now, somewhere along the line — it's not just clear when — the problem of limits came up; that is, in any insurance policy you have got to put a figure somewhere along [6] the line; and when that came up Meeker had a suggestion.

Now, Meeker knew that his insurance company as a matter of course looked at buildings, churches, libraries, anything else they insured, prior to insuring them. I suppose he would be presumed to know, since he is in the insurance business, the reason why that was done, but I don't think it's necessary to find one way or the other that he did or he didn't know why it was done.

To digress for a minute perhaps, there is an Ohio law which went on the books about 80 years ago, and it's Revised Code 3929.25 and it provides that an insurance company, before it renews any policy, shall have a building or structure examined by its agent and a full description thereof made and its "insurable value" fixed by said agent. Now, we will refer to that statute again, but for the moment we simply refer to it as the reason why Mr. Meeker with his experience knew that such appraisals were made. Now, of course, the reason for such appraisals has nothing to do with this case, really.

That statute got on the books in this way: It used to was the people would try to buy more insurance than they were supposed to buy; then a loss would take place and the insurance company would say, "Oh, you didn't lose as much as you had it insured for," so the insurance company would refuse to pay the loss and then there would be a lawsuit [7] and everybody would have a go-round.

So the legislature made up its mind that they would stop that sort of thing and they said in effect that before any insurance company issues a policy it will go out and examine what it's insuring and arrive at the insurable

value, and if that value gets in a renewal policy and there is a complete loss the insurance company can never question it. It's the same even if they don't do it. The courts have construed that statute, even if they don't do it, if they allow the amount to get into the renewal policy the insurance company is stuck with it, and we will refer to that statute later on.

So Meeker, knowing that his company was going to make some sort of appraisal, informed the church authorities of that and informed them at a time when there was under discussion what the limits were going to be and at a time when there was at least some mention made of the possibility of the church getting a formal appraisal on the property in question.

Now, this Court will find as a fact in accordance with Mr. Earls' testimony that it is customary in the insurance field and it is the experience of mankind in the insurance field and in the business world today for the insured, if he is insuring something which he thinks is of debatable value, to find out for himself in some fashion, and it's generally done through a formal appraisal, what the [8] value is, the market value or the replacement value or whatever you are dealing with, what the value is. That is in fact the custom in the trade existent as far as the populace and the companies both in the trade are concerned in this area.

In any event, at the time that subject was under discussion Mr. Meeker informed the church authorities that his company was going to make an appraisal, and that information was given for the purpose of eventually getting into the policy, if it is was acceptable on its face, the figure arrived at by his insurance company. It went even further than that. The understanding between the two agents of the two insurance companies, Meeker and Morgan, ac-

quiesced in and with the knowledge of the church, was that if, as and when that value was obtained from the defendant company, that value would be the basic figure on which the competitive bidding would take place between the two insurance agents.

Now, before we pass it, one of the problems with this case certainly comes about in the utmost good faith. Meeker used the term "full replacement" and the pastor and the board heard the term "full replacement," and "full replacement" means a lot of different things in the insurance field.

To the average person, the average member of the public uninformed in such matters, the term "full replacement," [9] if his insurance man sells him a full replacement policy, that means, "No matter what happens to it, we will give you the money to put it back." And when an insurance man uses the term "full replacement," he is using it in contradiction or contradistinction to the term "reconstruction cost new less depreciation," and people in the trade understand that.

They are technical terms. The pastor in the church understood it one way. The insurance agents understood it another way. They never discussed it out and they both proceeded in good faith based on their own understanding or misunderstanding, as the case may be; and it's probably one of the basic reasons that this case is in this Court today.

In any event, the appraisal was obtained, and we have forgotten the gentleman's name — I have got something to remind me of it —

MR. ELLIOTT: Weaver, your Honor.

THE COURT: Weaver. Thank you. Weaver was an employee of the defendant company and he was sent up to Franklin for the purpose of making the appraisal

which the insurance company was required to make at least for renewal purposes under the statute we have quoted. It actually wasn't necessary for him to and he actually didn't get into appraising the Education Building. That had just been completed. Everybody knew the cost of that, and that was $300,000.

[10] The problem was to appraise the sanctuary and he appraised the sanctuary and as a result of his appraisal there came back to Franklin and specifically to Mr. Meeker a letter. We don't know what was in the letter, but one of the exhibits which is in this case indicated that the "100 percent value" of the two buildings combined was $570,000 (including contents).

Mr. Meeker in some manner informed the church of that valuation. The church acquiesced in that valuation. Mr. Meeker acquiesced in that valuation. This Court finds as a fact that at that time Mr. Meeker, representing and an agent of the Insurance Company of North America, and the church agreed that in fact the "100 percent" valuation of those two buildings at that time was $570,000. The defendant "proposed that" (Plaintiff's Exhibit 10) and proposed that value as the full one for inclusion in a 90 percent co policy.

Now, there is some indication that not only did this church not know too much about coinsurance but there is an indication that maybe some other people didn't who maybe should have known because on the basis of a valuation of $570,000 the amount on page 1 of Plaintiff's Exhibit 1, which is in fact $570,000, should only have been $513,000 on a 90 percent coinsurance basis. The inclusion on page 1, taking this policy as a type, of $570,000 would indicate a valuation, an actual valuation of something in the neighborhood of $633,300. All right. So that was in June of '64.

[11] The insurance company then issued its policy to the church with the stated limitations on page 1 of $570,000. The policy was written on a one-year basis or, in any event, it was in fact renewed so that the fact of the renewal brought into play the Revised Code section which we have mentioned. Whether or not the insurance company did or did not go out and reappraise at that time, there was in fact no examination made at that time; and the Ohio case that deals with that is Queen City against Leslie, 47 Ohio State 409.

Now, within ten days after the renewal policy had been issued, which likewise contained a figure of $570,000 as the limit, the church burnt down. It was not a total loss, and this Court so finds. It was a partial loss.

Now, the policy contains an arbitration clause and this matter went to arbitration for the fixation of two figures; A, the value of the church, replacement value, total replacement value of the church at the time of the loss in June of 1965 or nine days after the renewal. The arbitrators found that to be $855,000. The replacement cost under the loss payment clause on page 4 of the policy was determined by the arbitrators to be $574,935.76, that being the replacement cost of the partial loss which actually took place.

Now, here is the problem. The first page of the policy recites that the Insurance Company of North America does insure the church and the limits of liability of this [12] insurance in respect to the real property is $570,000. Thirdly, this "90 percent coinsurance clause" applies. Then this in the interior of the policy:

"The extent of the company's liability is limited to the actual cash value of the property at the time of loss, not to exceed the applicable limits shown on page 1 and not exceeding the amount which it would cost to repair or replace.

" 'Replacement cost' " means "full cost of repair or replacement without deduction for depreciation."

That's what Mr. Meeker meant (parenthetically) when he said "fuil replacement," and that's where he got that. Then here is the one that causes this case:

"This company," the defendant, "shall not be liable for a greater proportion of any loss than the amount hereby insured," that is to say $570,000, "bears to" 90 percent "of the actual cash value of the property at the time of loss," and we can leave out the balance of that paragraph because it doesn't have to do with this particular case.

So, to get back, the actual cash value of the building, it has been determined in a manner binding on everybody in this case, is $855,000. The loss was $574,000. Ninety percent of $855,000 in $769,514; and if that figure, $769,514, had been on page 1 of this policy and the premium paid accordingly, this case would never have taken place.

But the amount on the face of the policy was [13] $570,000; and by taking a 90 co the insured in effect underwrites or guarantees that that is 90 percent of the actual cash value. As a matter of fact, it was a percentage less than that; 570,000 is 76 percent of the figure which should have been there. So that the insured, applying those figures — and if we are wrong in our mathematics you can straighten it out — applying those figures, 76 percent to a loss of $570,000, they paid the plaintiff $430,000 in July of 1967, invoking the coinsurance clause. This lawsuit is for the balance which is approximately $144,000.

Now, this Court finds this to be the law of Ohio. This is a diversity case. This Court is bound by the law of Ohio to the extent it's expressed. To the extent it's not expressed — and there is no case actually on the facts of this case in Ohio, as far as anybody can find anyplace else — but if there is no express law of Ohio, then it's the obli-

gation of this Court to determine, or as somebody recently said in Gatlinburg, guess, what the Supreme Court of Ohio would do with it if it had it.

Now, first, it is the Ohio law that in the absence of fraud or mutual mistake parties to an insurance contract are bound by its provisions. There is no claim here either of fraud or mistake. So, as a matter of law, the terms of this contract cannot be altered by any parol evidence or by any court violating the terms of the contract. The church as a [14] matter of law is bound by the coinsurance clause or, stated otherwise, a person is conclusively presumed to know the content of the contract which he buys, whether he does or does not know that in fact.

In Wagner against the Insurance Company, 132 Ohio State 405, the first syllabus reads: "A fire insurance policy should be construed like any other contract and, if wholly in writing, its terms cannot be contradicted, varied or modified by parol."

The same Court has expressed it in other ways, and we will refer to a few of them in Travelers' Insurance Co. vs. Myers, which is 62 Ohio State at 541: "Since the insured have received, accepted and retained the policy, they are parties to it, although not signing it, and are presumed to know and accept all of its terms and conditions."

In the same volume, in Union Central v. Hook, at page 263: "* * * the presumption is conclusive, in the absence of fraud and mistake, that" the insured "knew the contents of the" policy. And that is probably enough for that point.

So, insofar as this case involves this question — and it does, because of about $2,000 of it does — there is no fraud here. There is not even the slightest evidence of fraud, let alone clear and convincing evidence. There is no evidence that the insurance company or anybody connected with [15] it either defrauded or tried to defraud this

church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense.

There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is in a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake. So that insofar as this case involved the question of whether or not this Court could change this policy so as to substitute a figure for the $570,000 figure appearing on page 1, the answer is this Court cannot, nor can this Court delete the coinsurance clause because of the conclusive presumption of knowledge which the Supreme Court of Ohio has dictated and to which this Court, of course, must be obedient.

The second conclusion of law of this Court is that the knowledge of Morgan shall not be and is not imputed to the church, the reason being that while Morgan was a treasurer of the church, he had a standing adverse interest in this entire situation, or he was, as the evidence has shown, his company was eventually interested in getting the insurance of this church, and how that adverse interest would have affected a person only the Lord knows. But he did have a standing adverse [16] interest, so this Court will hold as a matter of law that his knowledge of the underinsurance is not impurted (sic) to the church. It hardly goes without saying that he was not a sole agent of the church in this respect, so we don't have involved the sole agent exception to the imputation of an agent having adverse interest.

The third conclusion of law is this, that the term "insurable value" as used in Ohio Revised Code 3929.25,

to which we have referred, has the same meaning for purposes of this case as these two terms "actual cash value of the property at time of loss" as used in the coinsurance clause, and the term "full replacement" as used in either of the conversations between the parties to this case and the full replacement language of the policy itself. In this case the term "100 percent value," as "proposed" by the defendant (Plaintiff's Exhibit 10) and agreed on by the church and the defendant before the policy issued — means the same, also. We previously mentioned the language and won't go back to it.

Fourth, the contract on its face says "to the extent of $570,000." That's different from full replacement cost, and it would be a violation of the parol evidence rule to change it.

Fifth, that when a renewal is made by an insurance company in Ohio, it is under the duty and obligation to go out and examine the property and fix the "full insurable value." [17] Whether it does or doesn't do that is unimportant. If a value finds its way into an insurance policy, that is the full insurable value for the purposes of any controversy which may arise.

Now, we are fully aware that that section of the code on its face applies only to complete losses and this case is not a complete loss, and we are fully aware that the purposes sought to be served by that statute in terms of specifics are not directly involved in this case. But the Supreme Court of Ohio through the years has had occasion to talk about this section and, for instance, in the Leslie case which we have referred to the Court, in referring to what the purpose of this section was, said this:

"The performance of this duty" by the company "will enable the company to ascertain for itself the condition of the building, the nature of the risk, and determine the

amount for which it is willing to write the policy. The responsibility is thus cast upon the insurance company, of determining by such examination, whether it will insure the building, and if so, for what sum; and when it so chooses to take the risk, issue its policy, and receive premiums upon it, there is no reason why it should not be bound by its own examination, and valuation."

Now, the same expression finds its way into the Ohio books. It's a Common Pleas Court case, Judge Crossland, [18] who is an excellent Judge in Zanesville. That was as late as 1950. Barrick against the Ohio State Association in 83 Abstract 545 in Muskingum County, and Judge Crossland said this:

"Values being somewhat a matter of opinion and defendant preparing and writing the policy it issued was always in a position to decline to accept the stated amount of insurance requested or itself to request and require a different and lesser sum, if it so determined, as its own condition either of originally issuing or later continuing insurance protection.

"Clearly," he said, "this section of law is a broad and general statement of public policy and specific intent and no exclusion is implied or expressed."

So it does seem to be the public policy of the law of Ohio to invoke that statute as a matter of principle since it is a public policy expression.

Now, this case probably would be easier to see maybe if this is what happened. It might be easier to see if the church had burnt down ten minutes after the policy had been signed because then here is what we have. We have almost this: Suppose I have heard of coinsurance. I want to get the breaks of coinsurance offers so I go into an insurance agency and I say: "I own a house out in Mulberry and I want to buy 90 coinsurance on it and I don't

want any rumpus about whether [19] I have properly insured this. I don't want to have any trouble with you on coinsurance. You tell me what the figure is that ought to be on page 1 of my policy. You tell me what 90 percent of my value is."

So the insurance agency says: "Oh, I pass by your house every so often. I know what it is. It's blank thousand dollars."

So he signs a policy and I pay him and ten minutes later the house burns down and the next day the insurance company says: "What we told you was wrong. Your house was worth more. You only insured it for 45 percent. Therefore you should only get 45 percent of the loss."

And that is about what happened here in this period of time. The Ohio Statute, which is 3922.27 does provide that a person who solicits insurance and procures an application shall be considered the agent of the company despite any contrary provisions in the application or the policy.

So that Mr. Meeker for purposes of this policy was the Insurance Company of North America, and it was Mr. Meeker, we find as a fact, who suggested the insurable value which was acquiesced in and as a matter of contract was agreed on by the parties to this case in June of '64 and carried over in the renewal.

So the problem boils down to: May an insurance [20] company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4? It's the conclusion of law of this Court that, having so agreed, the company may not.

Now, to come to the amount here. The company has paid on the Schedule A loss $425,807.28. The replacement cost of the Schedule A items is $574,935.76, leaving a balance on those items, that is Schedule A items, of $159,-045.48.

As we have seen, this Court has held that we cannot up the $570,000 figure because of the parol evidence rule. So in applying the equitable estoppel principle which we have, the limit 570 would hold and the recoverable balance to the plaintiff would be $144,129.72. The loss insofar as it involved the rest of the loss was more amicably adjusted by these parties on July 19, 1967. So the judgment will bear interest from that date.

This Court is not holding that a renewal appraisal made by an insurer in Ohio, as required by Revised Code Section 3929.25 — or its equivalent, permitting an insurable value to be inserted without an appraisal — to repeat, this Court is not holding that such an arrived-at value in a fire policy in any way is binding on the insurer for coinsurance purposes. We want to make it clear that we are not holding that the making of such an appraisal or the insertion of such value in in any way estops the insurer from invoking the coinsurance [21] clause, in the event of either a total or partial loss, or in any way prevents the insurer from contesting whether, for purposes of the coinsurance clause, the insured did in fact carry the necessary percentage.

We do hold, however, that where an insurer does make its own appraisal, "proposes" to the insured that it is the "100 percent" value in connection with a 90 percent coinsurance "proposal" (Plaintiff's Exhibit 10), participates in the determination of the "limits" amount, and agrees with the insured that the amount is the correct one for 90 percent coinsurance purposes — we do hold that: First, the insurer has agreed that such value is in fact at that time the actual cash value of the property — or its full replacement cost; and second, that under the law of equitable estoppel, even though the conclusion of express oral agreement be discarded, the insurer is estopped to question the correctness of the inserted or limits amount for coinsurance

purposes. Under either view the insured would be entitled to recover up to the limits amount.

To return to the "at that time" — it is true that the loss here was one renewal and 53 weeks later than the original agreement or determination. However, there is no evidence in this case of value change during that period, for one thing, and, for another, it was the original agreement or participation that determined the amount both in the original [22] issue and the renewal.

The defendant, of course, excepts generally to this ruling and conclusion of the Court. The plaintiff may propose and present to the defendant a judgment entry consistent herewith which, of course, will not be effective or final until it goes on.

There undoubtedly will be an appeal in this case and, while we are all here, a cost appeal bond will be fixed at the standard $250. It would be hoped that you two gentlemen can agree on a supersedeas bond. I suppose you want a supersedeas. If you can't agree on it, write us and tell us what your problem is.

We want to thank both counsel for your presentation of this case. All three of you have done excellent.

If no one has anything further in this case, Mr. Ruppert —

MR. UTZ: Nothing further, your Honor.

THE COURT: — Mr. Elliott, Mr. Utz? Anything further at the moment?

MR. UTZ: Nothing further.

THE COURT: Very well. You may recess until tomorrow morning.

(Thereupon, at 11:20 a.m., the hearing in the above-styled action came to a close.)

# APPENDIX B

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**No. 20740**

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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| FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO, *Plaintiff-Appellee,* v. INSURANCE COMPANY OF NORTH AMERICA, *Defendant-Appellant.* | APPEAL from United States District Court for the Southern District of Ohio, Western Division. |

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Decided and Filed June 8, 1971.

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Before WEICK, EDWARDS and BROOKS, Circuit Judges.

WEICK, Circuit Judge. The only issue in this appeal is whether the Insurance Company is estopped from invoking the 90% co-insurance clause in a fire insurance policy.

The Church owned a structure in Franklin, Ohio, consisting of a sanctuary building of the vintage of 1893, which was connected to a new educational building constructed in 1964, at a cost of $300,000.

Prior to the issuance of the policy of fire insurance in suit, the insurance business of the church had been divided between two insurance agents, Carl Morgan and Fred Meeker, both of whom were members of the church. The

insurance on the sanctuary building totaled $125,000. Insurance on the education building totaled $300,000. Meeker wrote two-thirds of the insurance on the sanctuary, in seven or eight policies; Morgan wrote one-third of the insurance on the sanctuary in a number of policies, plus the coverage on the new education building. Meeker had written insurance policies for the church since 1921, and prior to that time his father had the church's insurance business.

Meeker proposed to Morgan that the church, instead of having so many policies of insurance, should have one package policy, and that it should receive bids for the business; Morgan agreed. Meeker also discussed his proposal with the pastor of the church, and told him that his company wrote a policy with broad coverage providing for replacement without depreciation.

Meeker appeared before a meeting of the trustees of the church and the trustees agreed to the proposal. Meeker also suggested that an appraisal of the sanctuary be made by his company, which suggestion was also approved by the trustees. The appraisal was made by Ronald Weaver, who was a special agent of the Insurance Company and was experienced in the appraisal of buildings for insurance purposes. Weaver was also a member of the church.

Weaver appraised the new education building at the full amount of its cost, $300,000. He appraised the sanctuary at $250,000. In making the appraisal of the sanctuary, he examined the building, took measurements of it, and determined it had 197,600 cubic feet. He then used Beck's Manual, which was standard in the insurance industry, to obtain a value of $254,221, which figure was rounded off to $250,000-valuation.

Bids for the package policy were submitted by Meeker

and Morgan.[1] Meeker's bid of $687-annual premium was low, and he was awarded the business. Morgan's bid was twice the amount of Meeker's bid.

The policy in suit was then written for $570,000, which included $20,000 covering contents of the buildings. The policy contained a ninety per cent co-insurance clause which provided:

> "This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured [$570,000] bears to . . . [90%] of the actual cash value of the property at the time of the loss."

The policy was delivered to and accepted by the church.

Meeker's recollection was that the other policies that he had previously written contained co-insurance clauses. The evidence was to the effect that most industrial and church properties were insured by policies with co-insurance clauses. The use of such clauses resulted in substantial savings in premiums, ranging from 15% to as much as 80% on insurance covering fireproof buildings. The purpose of the co-insurance is to require the insured to carry insurance for the full value of the property. Where the property is under-insured, the insured is required to assume his proportionate share of the loss.

On June 19, 1965 a fire, caused by arson, totally destroyed the sanctuary and partially damaged the education building. The parties were unable to agree on the amount payable under the policy, and arbitration was invoked. The arbitrators determined the total value of the buildings

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[1] At that time Morgan was selling his insurance agency to Ralph E. Wade.

and contents at the time of the fire was $855,016.19, and that the partial loss sustained amounted to $574,935.36.

The Insurance Company then invoked the 90% co-insurance clause in the policy, using the following equation:

$$\frac{\$570{,}000 \text{ (amount of insurance)}}{\$769{,}514 \text{ (90\% of full replacement value)}} \times \$574{,}935.36 \text{ (actual loss)} = \$425{,}810$$

The Insurance Company added $4,529.50, additional expenses not covered by the co-insurance clause, and paid $430,399.78 to the church. The church was not satisfied with payment of this amount and instituted the present action to recover the difference between the amount of the payment and $570,000 which was the face amount of the policy. The District Court, applying the doctrine of equitable estoppel, entered judgment against the Company in the full amount of $144,129.72, plus interest.

It was the theory of the church that the insurer was estopped to invoke the 90% co-insurance clause because it had appraised the sanctuary too low and had used the appraisal in fixing the face amount of the policy. The only proof offered, however, to establish the claim that Weaver's appraisal was too low was the award of the arbitrators as to the value of the property more than a year later and on an entirely different sanctuary which in no way resembled the old sanctuary.

The District Court in its findings of fact found that both agents (Meeker and Morgan) in their handling of the insurance "proceeded in good faith." It found: "There is no claim here of fraud or mistake."

The Court further found:

> "So, insofar as this case involves this question — and it does, because of about $2,000 of it does —

there is no fraud here. There is not even the slightest evidence of fraud, let alone clear and convincing evidence. There is no evidence that the insurance company or anybody connected with [15] it either defrauded or tried to defraud this church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense.

"There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is in a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake. So that insofar as this case involved the question of whether or not this Court could change this policy so as to substitute a figure for the $570,000 figure appearing on page 1, the answer is this Court cannot, nor can this Court delete the coinsurance clause because of the conclusive presumption of knowledge which the Supreme Court of Ohio has dictated and to which this Court, of course, must be obedient."

The Court concluded:

"So the problem boils down to: May an insurance company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4? It's the conclusion of law of this Court that, having so agreed, the company may not."

It is the church rather than the Insurance Company which is contesting the valuation of $570,000 (face amount of the policy). The annual premium of $687 was computed on this amount. The church contends that the property should have been appraised at $855,016.19 (the appraisal by the arbitrators, made more than a year later,

of a different structure) and that this amount should have been the face amount of the policy. The difference between the two appraisals is $285,016.19. The church, however, paid no premium for a valuation in excess of $570,000.

The findings of fact, in our opinion, compel a conclusion different than that reached by the District Judge.

There was not an iota of evidence offered by the church that Mr. Weaver, in making the appraisal of the sanctuary, was negligent or that he made a mistake or that Beck's Manual, which he used and which is standard in the insurance industry, was improper to use in making the appraisal. Nor is there any evidence that the trustees of the church were ignorant, did not know what they were doing, or were imposed on by Meeker and Weaver, who were loyal members of the church. It was Meeker who equipped the new chapel.

The District Court's conclusion is based entirely on the fact that the arbitrators, more than a year later, arrived at a replacement value which was much higher than Weaver's earlier appraisal, and the fact that there was no proof of any value change during the intervening period.

The burden of proof to establish estoppel, however, was on the church, and it is clear that the church failed to meet its burden. The discrepancy in values could be accounted for in part at least by the fact that the church apparently did more than merely replace its old sanctuary with a comparable new one.

Mr. Weaver testified on cross-examination:

> "Q How many cubic foot are in the present edifice, approximately?
>
> "A I couldn't answer that question. I think it's bigger; yes, sir.
>
> "Q I see. And the ceilings and so forth are bigger, deeper?

"A Yes. The edifice that's now standing where the old church did doesn't resemble the old church in any way shape or form.

"Q In other words, there is no comparison between the present church and the old church?

"A No, sir."

The new sanctuary was not completed and occupied until November 2, 1969.

Furthermore, if we are to indulge in drawing inferences, it is equally as probable that the arbitrators arrived at a valuation too high, as it is to infer that Weaver's appraisal was too low. But estoppel may not be established by mere inferences. We also know that opposing appraisers who testify in court do not always arrive at the same figure.

Insofar as Mr. Weaver's appraisal of the sanctuary is concerned, it was in an amount which was twice the amount of insurance previously carried on the sanctuary; and Mr. Weaver appraised the new education building at the full amount of its cost.

Section 3929.25, Ohio Revised Code, provides:

> "A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by said agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy or renewal, upon which the insurer received a premium, shall be paid."

Special Agent Weaver literally complied with this statute in making the appraisal. No estoppel can operate,

therefore, against the insurer merely because it complied with the Ohio law.

The only purpose of the statute's requirement of inspection and appraisal was to fix a liability on the insurer for payment of the whole amount of the policy of insurance in case of a total loss. Here the loss was only partial. The District Court held that the church was bound by the co-insurance clause except for the estoppel. There was no evidence that the church objected to Weaver's appraisal. If the church was dissatisfied with Weaver's appraisal, there was nothing to prevent it from having the structure appraised by another appraiser.

In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive, of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake.[2] *Fleming* v. *City of Steubenville*, 44 Ohio App. 121, 125, 126 (1931); *New York Central R.R.* v. *General Motors Corp.*, 182 F.Supp. 278, 286 (N.D. Ohio, 1960); 20 Ohio Jur.2d, *Estoppel and Waiver*, § 35.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

EDWARDS, Circuit Judge, dissenting. The District Judge, after trying the disputed issues of fact in this case, found that appellant insurance company had proposed the figure

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[2] The dissent bases estoppel in pais on the ground that Weaver in his appraisal made a mistake. There was no proof that Weaver had made a mistake, but even if he had, unless it was a negligent mistake there could be no estoppel in pais, *Beardsley* v. *Foot*, 14 Ohio St. 414, 416 (1863), relied on in the dissent. Nor was there any proof that Weaver was negligent.

of $570,000 as the full replacement value of the property to be insured:

> "This Court finds as a fact that at that time Mr. Meeker, representing and an agent of the Insurance Company of North America, and the church agreed that in fact the '100 percent' valuation of those two buildings at that time was $570,000. The defendant 'proposed that' (Plaintiff's Exhibit 10) and proposed that value as the full one for inclusion in a 90 percent co policy."

He also found as to the actual value at the time of loss:

> "Now, the policy contains an arbitration clause and this matter went to arbitration for the fixation of two figures; A, the value of the church, replacement value, total replacement value of the church at the time of the loss in June of 1965 or nine days after the renewal. The arbitrators found that to be $855,000. The replacement cost under the loss payment clause on page 4 of the policy was determined by the arbitrators to be $574,935.76, that being the replacement cost of the partial loss which actually took place."

He then summarized the legal problem posed by the case as follows:

> "So that Mr. Meeker for purposes of this policy was the Insurance Company of North America, and it was Mr. Meeker, we find as a fact, who suggested the insurable value which was acquiesced in and as a matter of contract was agreed on by the parties to this case in June of '64 and carried over in the renewal.
>
> "So the problem boils down to: May an insurance [20] company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4?"

The District Judge then held that under the facts outlined above appellant insurance company was estopped from reliance upon the 90% coinsurance clause as a limitation on recovery under the policy.

On this record it is undisputed that the $570,000 valuation in the policy resulted from appellant insurance company's appraisal and that Meeker (who was found by the District Judge to be agent of the insurance company) represented that figure as the 100% value to the plaintiff church and told the church that it could rely on that value and that the plaintiff church did so rely in signing the contract.

As the majority opinion holds, estoppel is a doctrine which generally requires a fraudulent representation, or intentional misrepresentation with knowledge, plus reliance by the opposite party to its damage. *New York Central R.R.* v. *General Motors Corp.*, 182 F. Supp. 273, 288 (N.D. Ohio 1960); 20 Ohio Jur.2d *Estoppel and Waiver* § 35 (1956).

What is lacking in this case, of course, is the element of willful or fraudulent misrepresentation.

The law of Ohio also recognizes a form of estoppel called "estoppel *in pais*" under which statements made in good faith may furnish grounds for estoppel.

In the leading case on this subject the Supreme Court of Ohio held:

> "Admissions *in pias*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterward gainsaying them." *Beardsley* v. *Foot*, 14 Ohio St. 414 (1863).

*See also Union Ins. Co.* v. *McGookey*, 33 Ohio St. 555 (1878).

While *Beardsley* is an old case, it has recently been cited with approval by the Ohio Supreme Court. *Mutual Finance Co.* v. *Politzer,* 21 Ohio St. 2d 177 (1970).

Where, as here, the access to information is substantially greater on the part of one party and that party both creates the mistake and urges the opposite party to rely thereon to its ultimate damage, I feel that Ohio law permits a court in equity to hold that the party basically responsible is estopped from taking advantage of its own mistake.

In an opinion holding an insurance company was estopped from relying upon a written condition of the policy, the Ohio Supreme Court said:

> "The tendency of many courts is to apply the principles of waiver and estoppel in a liberal manner to insurance contracts to enforce good faith and to prevent injustice and fraud where the insured has been misled by the acts of the insurer or its agents." *Pannunzio* v. *Monumental Life Ins. Co.,* 168 Ohio St. 95, 106 (1958).

I would affirm the judgment of the District Court.

## APPENDIX C

No. 20,740

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO,

Plaintiff-appellee,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellant.

## ORDER ON PETITION FOR REHEARING

Filed July 9, 1971

Before WEICK, EDWARDS and BROOKS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

It is further ordered that in the second sentence in the first complete paragraph on page 4 of the opinion, there be deleted therefrom the following words: "and on an entirely different sanctuary which in no way resembled the old sanctuary"; and that a period be placed after the word "later," preceding the deleted language.

It is further ordered that the third sentence in the second complete paragraph on page 5 of the opinion be amended so as to read as follows:

> "The church contends that the property should have been appraised at $855,016.19 (the appraisal by the arbitrators, made more than a year later) and that this amount should have been the face amount of the policy."

It is further ordered that the last sentence in the first complete paragraph on page 6 of the opinion be deleted, and that there be substituted in the place thereof, the following:

> "It must be remembered that the arbitrators on May 3, 1967, nearly three years after Weaver's appraisal, appraised the property as of the date of the fire, June 19, 1965, and that the church did more than merely replace its old sanctuary with a comparable new one."

Judge Edwards dissents.
Entered by order of the Court.

/s/ James A. Higgins, Clerk

Supreme Court, U.S.
FILED
OCT 29 1971
E. ROBERT SEAVER, CLERK

In The

# SUPREME COURT OF THE UNITED STATES

No. 71-477

FIRST REGULAR BAPTIST CHURCH
OF FRANKLIN, OHIO,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*Identification of Parties:* Throughout this Brief, the parties are designated as they were in the opinions of the courts below:

Petitioner : Church
Respondent: Insurance Company

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All forms of emphasis used in this Brief have been added by the authors, unless otherwise specifically indicated.

In The

# SUPREME COURT OF THE UNITED STATES

No. 71-477

FIRST REGULAR BAPTIST CHURCH
OF FRANKLIN, OHIO,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### OPINIONS BELOW

The opinion of the District Court for the Southern District of Ohio is not reported and appears as Appendix A of the Petitioner's brief. The opinion of the Court of Appeals for the Sixth Circuit is reported in 444 F.2d 279 (1971). Since the opinion was amended in the order denying rehearing, it is included here as Appendix A as amended and as it is published.

## STATEMENT OF THE CASE

The statement of the case found in the Petition for A Writ of Certiorari is generally correct except for the first sentence of the next to last paragraph wherein the Petitioner states that the Court of Appeals held that there can be no estoppel in Ohio in the "absence of willful or fraudulent misrepresentation." The actual holding in the majority opinion is "In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive, of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. . . ."

## REASONS FOR NOT GRANTING THE WRIT

The decision by the Sixth Circuit Court of Appeals is not a departure from accepted federal case law which does not require that each decision reversing a District Court on a local law question be unanimous. Further, the decision of the Court of Appeals in this case is clearly supported by Ohio case law.

### I.

While Title 28 United States Code, Rule 52 (a) provides, in part, ". . . Findings of *fact* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ." the instant case does not involve a question of fact and the United States Sixth Circuit Court of Appeals, in the opinion, fully adopted the facts as decided by the trial judge. The real question con-

sists rather of the legal standards required to be applied to the undisputed facts of the case. The trial judge's ultimate conclusion, therefore, is not shielded by the "clearly erroneous" test embodied in Rules 52 (a) of the Federal Rules of Civil Procedure. *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed. 2d 415 (1966); *U.S.* v. *Mississippi Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed 2d 268. In addition it may be noted that a finding is "clearly erroneous" where, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 92 L.Ed. 746; *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194; 83 S.Ct. 1773; 10 L.Ed. 2d 823.

The respondent here recognizes that the Circuit Courts of Appeal have stated, in a number of cases, that the decision of the trial court as to the law of the state in which it sits will be afforded "great weight" by the Courts of Appeal and that the view of the trial court will be accepted unless, as in this case, the Court is convinced that the trial court's determination was based upon a clear misconception or misapplication of local law, *Bookwalter* v. *Phelps*, 325 F.2d 186, but as Mr. Justice Blackmun stated in the dissenting opinion in *Bookwalter* v. *Phelps*: ". . . This court has not hesitated, nevertheless, when occasion demands, to reverse a federal trial judge on a question of state law if we have felt that his holding was improbable or less than 'permissible'. See, for example, *Massachusetts Bonding and Ins. Co.* v. *Julius Seidel Lumber Co.*, 279 F.2d 861, 869 (8 Cir. 1960); *Archer-Daniels Midland Co.* v. *Powell*, 293 F.2d 389, 397 (8 Cir. 1961); *L. C. Eddy, Inc.* v. *City of Arkadelphia*, 303 F.2d 473 (8 Cir. 1962) . . ."

The facts of the instant case, as set forth by the Sixth Circuit Court of Appeals in the opinion (Appendix A) indicate that they are unique in Ohio law and, in fact, research has developed no cases involving facts parallel to the facts of this case. This Court said in *Commissioner* v. *Bosch,* 387 U.S. 456; 87 S.Ct. 1776; 18 L.Ed.2d 886 ". . . This is not a diversity case but the same principle may be applied for the same reason, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 100 L.Ed. 199, 76 S.Ct. 273 (1956)."

In *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 93 L.Ed. 1520, 69 S.Ct. 1233, this Court affirmed a judgment of the Tenth Circuit Court of Appeals reversing the District Court upon the District Court's interpretation of Kansas law. This Court said ". . . We ordinarily accept the determination of local law by the Court of Appeals (see *Huddleston* v. *Dwyer,* 322 U.S. 232, 237, 88 L.Ed. 1246, 1249, 64 S.Ct. 1015) and we will not disturb it here."

And in *General Box* v. *United States,* 351 U.S. 159, 100 L.Ed. 1055, 76 S.Ct. 728, a case involving the application of Louisiana law, the decision of a highly respected and qualified district judge (see dissent by Mr. Justice Douglas) was reversed on the question of Louisiana law by the United States Court of Appeals for the Fifth Circuit. In the opinion, this Court said "We ordinarily accept the determination of the Court of Appeals on questions of local law, and we do so here. . . ." The *General Box* case is of

further interest and application to this case in that the decision of the Fifth Circuit Court of Appeals was not unanimous. The district judge, in other words, made a decision based upon an interpretation of local law, this decision was reversed by the Court of Appeals in a 2 to 1 decision (see 224 F.2d 7) and the Court of Appeals was affirmed by this Court.

In *Huddleston* v. *Dwyer,* 322 U.S. 232, 88 L.Ed. 1246, 64 S.Ct. 1015, this Court said ". . . The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore *do not review,* save in exceptional cases, the considered *determination of questions of state law by the intermediate federal appellate courts* . . ."

In *Byrd* v. *Blue Ridge Rural Elec. Corp.,* 356 U.S. 525, 2 L.Ed.2d 953, 78 S.Ct. 893; a diversity case involving the interpretation of a South Carolina statute the district court's interpretation of the South Carolina law was reversed by the Court of Appeals disagreeing with the district court's interpretation. On appeal to this court it was said "We ordinarily accept the interpretation of local law by the Court of Appeals, *cf. Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534, 93 L.Ed. 1520, 1523, 69 S.Ct. 1233, and do so readily here since neither party now disputes the interpretation."

Additional cases in which it has been said that the Supreme Court of the United States will ordinarily accept the determination of the Court of Appeals on questions of State law are: *Richards* v. *United States,* 369 U.S. 1, 7 L.Ed. 2d 492, 82 S.Ct. 585; *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301.

From the foregoing it appears that while a Circuit Court of Appeals will frequently accept a district court's determination on questions of local law, it is not bound to do

so and in some of the cases cited has reversed the district court on questions of local law. However, this Court has generally accepted the Circuit Court of Appeals' determination of questions of local law and this is so in cases wherein the Court of Appeals disagreed with the District Court on a question of local law, *General Box* v. *United States, supra.* In *Spiegel's Estate* v. *Commissioner, supra,* this Court said "It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of the question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

The fact that the decision of the Court of Appeals was not unanimous does not mean that the Court was in error in its determination of State law and would, in fact, indicate that reasonable arguments can be made based on Ohio cases to support a determination of the question either for or against the petitioner's contention. Therefore, under the circumstances, this Court should follow its general policy and leave undisturbed the Court of Appeals holding on a question of State law.

## II.

The question presented to the Sixth Circuit Court of Appeals, as well as to the District Court, by the facts of this case was whether the Respondent (Insurance Company of North America) was estopped to apply a co-insurance provision of a fire insurance policy after a partial loss to the insured property. The facts of the case are set forth in the opinion of the Sixth Circuit Court of Appeals (Appendix A) and will not be repeated here. The District Judge as well as the three judges of The Sixth Circuit Court of Ap-

peals agree that without an estoppel being applied to the facts of the case the Petitioner (First Regular Baptist Church of Franklin, Ohio) is bound by the terms of the insurance contract including the co-insurance provision. In addition, the judges of the Court of Appeals, as well as the District Court agree that there was no willful or fraudulent misrepresentation on the part of the Respondent in establishing the gross amount of insurance to cover the Petitioner's property. In Ohio law, in the context of estoppel, fraud, bad faith, misrepresentation and gross negligence are nearly synonymous, *McKenzie* v. *Steele,* 18 Ohio St. 38; *Board of Education* v. *Sinton,* 41 Ohio St. 504; *Bank* v. *Flour Co.,* 41 Ohio St. 552. All of the judges agree that none of these elements are present in the instant case. There is no evidence of fraud, misrepresentation or gross negligence on the part of the Respondent in the case.

It is clearly the law of Ohio that an equitable estoppel cannot exist in the absence of one of the aforementioned elements. As the Sixth Circuit Court of Appeals said in the majority opinion of that Court in this case, "In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. *Fleming* v. *City of Stubenville,* 44 Ohio App. 121, 125, 126 (1931); *New York Central R.R.* v. *General Motors Corp.,* 182 F.Supp. 273, 286 (N.D. Ohio, 1960); 20 Ohio Jur.2d, Estoppel and Waiver, Sec. 35."

In the dissenting opinion in this case, it is held that an estoppel *in pais* should apply in the case. To support this conclusion the Court cites *Beardsley* v. *Foot,* 14 Ohio St. 414 (1863); *Union Ins. Co.* v. *McCookey,* 33 Ohio St. 555

(1878); and *Mutual Finance Co.* v. *Politzer,* 21 Ohio St. 2d 177 (1970). In *Beardsley* v. *Foot, supra,* the action was to enjoin the defendant from asserting certain liens on real estate on the basis that the defendant had previously told the plaintiff that he owned no such lien knowing that the plaintiff intended to purchase the land. The defendant had admittedly forgotten about the liens he held upon the lands although he acted in good faith and without intent to deceive. In that case it was held that his negligence or forgetfulness was sufficient to establish an estoppel *in pais.* In *Union Ins. Co.* v. *McGookey, supra,* the facts were that the insurance company clothed its agent with apparent authority to issue the type of policy issued when, in fact, he had no such authority. The Court stated, "the law enforces the rule of good morals as a rule of policy, and estops a party from denying what cannot be denied without a breach of good faith . . ." In other words, bad faith on the part of a party to a contract will estop the party. Respondent has no quarrel with this principle of law but all of the judges below have agreed that there was no showing of bad faith on the part of Respondent. In *Finance Co.* v. *Politzer, supra,* the guarantor of a debt secured by a chattel mortgage made an agreement with the mortgagee which induced the mortgagee to so act as to provide the mortgagor with a statutory defense. It was held that this conduct by the guarantor estops him from taking the *unconscionable* position that the action of the mortgagee provides the guarantor with a defense. It was further held that this conduct estops the guarantor from enforcing any right to reimbursement from the mortgagor that would interfere with the defense that the guarantor knew he was providing for the mortgagor.

In all of the cases cited in support of the Petitioner's position there is the element of bad faith, negligence or

misrepresentation of a known fact. At the very least, in each of the cases there is evidence of mistake on the part of the party against whom the estoppel is claimed and the mistake is made in a matter in which the party sought to be estopped knew that the other would rely. In the instant case the trial judge stated "There is no evidence that the insurance company or anybody connected with it either defrauded or tried to defraud this church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense."

Ohio Courts have held that in the absence of proof of negligence there can be no estoppel. *Murfey, Blossom & Co.* v. *State,* 4 Ohio Ops. 443, 20 OL Abs. 176, 31 NE2d 134, affirmed by the Supreme Court in 131 Ohio St. 289, the Court said: "The doctrine of estoppel is usually applied to cases where the party sought to be estopped was guilty of some negligence or lack of diligence. If he is guilty of some negligence or lack of diligence he must take the consequences of his own acts which mislead others to act to their injury. We maintain that the doctrine of estoppel was never applied to a case where the person sought to be estopped was guilty of no negligence or lack of diligence whatsoever . . ." In the majority opinion of the Sixth Circuit Court of Appeals in this case the Court, at footnote 2, says, "The dissent bases estoppel *in pais* on the ground that Weaver in his appraisal made a mistake. There was no proof that Weaver made a mistake, but even if he had, unless it was a negligent mistake, there could be no estoppel *in pais, Beardsley* v. *Foot,* 14 Ohio St. 414, 416 (1863), relied on in the dissent. Nor was there any proof that Weaver was negligent."

It may be said, generally, that in Ohio the essential elements of equitable estoppel are:

1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with those which the party subsequently attempts to assert;

2) intention, or at least expectation, that such conduct shall be acted upon by the other party;

3) knowledge, actual or constructive, of the real facts.

As related to the party claiming the estoppel, the essentials generally are:

1) lack of knowledge and of the means of knowledge of the truth as to the facts in question;

2) reliance upon the conduct of the party estopped;

3) action based thereon of such character as to change his position prejudicially.

20 *Ohio Jurisprudence (2d)* 498 et seq.

It is considered elemental in the law of estoppel that knowledge on the part of one sought to be estopped is essential, *Bear* v. *Colonial Finance,* 42 Ohio App. 482. The material fact must be known to the party sought to be estopped at the time of his acts or conduct on which the estoppel is based, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. *New York Central Railroad* v. *General Motors Corp.,* 12 Ohio Op. (2d) 349, 182 F.Supp. 273. Gross negligence in failing to ascertain the facts has, in some cases, been regarded as equivalent to actual knowledge as a basis for

forming an estoppel. However, such negligence may not be induced by the fraud or representations of the other party and such negligence will not prevent a denial of knowledge in cases where the party asserting the estoppel is under as great a duty to learn the truth as is the party against whom the estoppel is asserted where the means of doing so are equally available. 20 *Ohio Jurisprudence (2d)* 507, et seq. In addition, in *Fleming* v. *City of Steubenville,* 44 Ohio App. 121, at 126 it is said "No estoppel arises where the representations or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake." Further, the *City of Steubenville* case, *supra,* quotes with approval language in 21 Corpus Juris 1119 to this effect: "In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied upon or acted upon it to his prejudice." The *City of Steubenville* case involved a dispute as to the width of a roadway where abutting owners had improved portions of the roadway by establishing lawns, gardens, etc. within what developed to be the right of way and the Court said "The city authorities had no more knowledge, and no more knowledge was accessible to them, than could be obtained in the same manner and by the same degree of diligence by the abutting owners." In *McKenzie* v. *Steele,* 18 Ohio St. 38, the Supreme Court of Ohio said, "To work an estoppel there must be prejudice to the party setting it up, and also fraud or bad faith — or their equivalent, gross negligence -- in the party to be estopped."

To like authority see *Board of Education* v. *Sinton,* 41 Ohio St. 504; *Bank* v. *Flour Co.,* 41 Ohio St. 552. In addition the representation must be of a material fact as opposed to an opinion or conclusion. 28 Am.Jur. (2d) 655. And as the trial judge found "There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake." In other words, the representation as to the value of the building was a representation on a matter of opinion and not of fact.

There is no question that the policy was written in the face amount of $570,000. There is also no doubt that the policy contained a 90% co-insurance clause and that the $570,000 limit of coverage was insufficient to comply with co-insurance provision. It then becomes the question as to who has the responsibility to make sure that the premises are adequately insured to comply with the provision. The record contains both testimony and the finding of the trial judge that the purpose in the so-called appraisal by the defendant was to make sure that the property was not overinsured. However, the effect of the Petitioner's argument is that the insurer becomes responsible to see that the property is properly insured. Such intent is not expressed in the evidence or in the policy. Nor does the law so hold. *Zechar* v. *All American Casualty Co.,* 116 Ohio App. 41. In the *Zechar* case the second headnote is:

> "2. In an action by the insured under a contract of insurance, the plaintiff cannot, on the theory of estoppel, obtain a greater right than that set forth in the contract of insurance."

The contract of insurance is clear and unambiguous, it should be given its clear meaning and intent. The trial

court's holding and Petitioner's argument here, in effect, say that it is all right that the Petitioner paid a premium based upon $570,000 coverage but that the insurance company should pay the loss as if the coverage had been $769,-514. To Respondent this seems to be giving the Petitioner a greater right than that set forth in the contract of insurance.

## CONCLUSION

The Petition for A Writ of Certiorari should be denied. Prior decisions of this Court have involved exactly the same situation as that involved in this case, that is, a divided decision by the Circuit Court of Appeals reversing a decision of the trial court on a question of local law, *General Box* v. *United States*, 351 US 159, 100 L.Ed. 1055, 76 S.Ct. 728, and this court affirmed the Circuit Court of Appeals. There is nothing new or novel in the occurrence.

Further, the decision of the Court of Appeals for the Sixth Circuit does not conflict with the established case law of Ohio and certainly the majority decision in this case is reasonable and supported by the Ohio law. This Court should, therefore, follow its general policy and leave undisturbed the Court of Appeals holding on a question of State law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301.

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## APPENDIX A

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No. 20740

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## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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| | |
|---|---|
| FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO, *Plaintiff-Appellee,* v. INSURANCE COMPANY OF NORTH AMERICA, *Defendant-Appellant.* | APPEAL from United States District Court for the Southern District of Ohio, Western Division. |

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Before WEICK, EDWARDS and BROOKS, Circuit Judges.

WEICK, Circuit Judge.

The only issue in this appeal is whether the Insurance Company is estopped from invoking the 90% co-insurance clause in a fire insurance policy.

The Church owned a structure in Franklin, Ohio, consisting of a sanctuary building of the vintage of 1893, which was connected to a new educational building constructed in 1964, at a cost of $300,000.

Prior to the issuance of the policy of fire insurance in suit, the insurance business of the church had been divided between two insurance agents, Carl Morgan and

Fred Meeker, both of whom were members of the church. The insurance on the sanctuary building totaled $125,000. Insurance on the education building totaled $300,000. Meeker wrote two-thirds of the insurance of the sanctuary, in seven or eight policies; Morgan wrote one-third of the insurance on the sanctuary in a number of policies, plus the coverage on the new education building. Meeker had written insurance policies for the church since 1921, and prior to that time his father had the church's insurance business.

Meeker proposed to Morgan that the church, instead of having so many policies of insurance, should have one package policy, and that it should receive bids for the business; Morgan agreed. Meeker also discussed his proposal with the pastor of the church, and told him that his company wrote a policy with broad coverage providing for replacement without depreciation.

Meeker appeared before a meeting of the trustees of the church and the trustees agreed to the proposal. Meeker also suggested that an appraisal of the sanctuary be made by his company, which suggestion was also approved by the trustees. The appraisal was made by Ronald Weaver, who was a special agent of the Insurance Company and was experienced in the appraisal of buildings for insurance purposes. Weaver was also a member of the church.

Weaver appraised the new education building at the full amount of its cost, $300,000. He appraised the sanctuary at $250,000. In making the appraisal of the sanctuary, he examined the building, took measurements of it, and determined it had 197,600 cubic feet. He then used Beck's Manual, which was standard in the insurance industry, to obtain a value of $254,221, which figure was rounded off to $250,000-valuation.

Bids for the package policy were submitted by Meeker and Morgan.[1] Meeker's bid of $687-annual premium was low, and he was awarded the business. Morgan's bid was twice the amount of Meeker's bid.

The policy in suit was then written for $570,000, which included $20,000 covering contents of the buildings. The policy contained a ninety per cent co-insurance clause which provided:

> "This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured [$570,000] bears to * * * [90%] of the actual cash value of the property at the time of the loss."

The policy was delivered to and accepted by the church.

Meeker's recollection was that the other policies that he had previously written contained co-insurance clauses. The evidence was to the effect that most industrial and church properties were insured by policies with co-insurance clauses. The use of such clauses resulted in substantial savings in premiums, ranging from 15% to as much as 80% on insurance covering fireproof buildings. The purpose of the co-insurance is to require the insured to carry insurance for the full value of the property. Where the property is under-insured, the insured is required to assume his proportionate share of the loss.

On June 19, 1965 a fire, caused by arson, totally destroyed the sanctuary and partially damaged the education building. The parties were unable to agree on the amount payable under the policy, and arbitration was invoked. The arbitrators determined the total value of the buildings

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[1] At that time Morgan was selling his insurance agency to Ralph E. Wade.

and contents at the time of the fire was $855,016.19, and that the partial loss sustained amounted to $574,935.36.

The Insurance Company then invoked the 90% co-insurance clause in the policy, using the following equation:

$$\frac{\$570{,}000 \text{ (amount of insurance)}}{\$769{,}514 \text{ (90\% of full replacement value)}} \times \$574{,}935.36 \text{ (actual loss)} = \$425{,}810$$

The Insurance Company added $4,529.50, additional expenses not covered by the co-insurance clause, and paid $430,399.78 to the church. The church was not satisfied with payment of this amount and instituted the present action to recover the difference between the amount of the payment and $570,000 which was the face amount of the policy. The District Court, applying the doctrine of equitable estoppel, entered judgment against the Company in the full amount of $144,129.72, plus interest.

It was the theory of the church that the insurer was estopped to invoke the 90% co-insurance clause because it had appraised the sanctuary too low and had used the appraisal in fixing the face amount of the policy. The only proof offered, however, to establish the claim that Weaver's appraisal was too low was the award of the arbitrators as to the value of the property more than a year later.

The District Court in its findings of fact found that both agents (Meeker and Morgan) in their handling of the insurance "proceeded in good faith." It found: "There is no claim here of fraud or mistake."

The Court further found:

> "So, insofar as this case involves this question — and it does, because of about $2,000 of it does — there is no fraud here. There is not even the slightest evidence of fraud, let alone clear and convincing evidence. There is no evidence that the insurance company or

anybody connected with [15] it either defrauded or tried to defraud this church, and there is no evidence that either the insurance agent or both of them or anybody connected with the church made any effort to defraud the Insurance Company of North America, and there is no mutual mistake in a legal sense.

"There was a mutual mistake in a matter of opinion in the valuation of this building. There isn't any question about that, but that is in a matter of opinion; it doesn't amount to any false representation, doesn't amount to any law-sense mutual mistake. So that insofar as this case involved the question of whether or not this Court could change this policy so as to substitute a figure for the $570,000 figure appearing on page 1, the answer is this Court cannot, nor can this Court delete the coinsurance clause because of the conclusive presumption of knowledge which the Supreme Court of Ohio has dictated and to which this Court, of course, must be obedient."

The Court concluded:

"So the problem boils down to: May an insurance company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4? It's the conclusion of law of this Court that, having so agreed, the company may not."

It is the church rather than the Insurance Company which is contesting the valuation of $570,000 (face amount of the policy). The annual premium of $687 was computed on this amount. The church contends that the property should have been appraised at $855,016.19 (the appraisal by the arbitrators, made more than a year later) and that this amount should have been the face amount of the policy. The difference between the two appraisals is $285,016.19. The church, however, paid no premium for a valuation in excess of $570,000.

The findings of fact, in our opinion, compel a conclusion different than that reached by the District Judge.

There was not an iota of evidence offered by the church that Mr. Weaver, in making the appraisal of the sanctuary, was negligent or that he made a mistake or that Beck's Manual, which he used and which is standard in the insurance industry, was improper to use in making the appraisal. Nor is there any evidence that the trustees of the church were ignorant, did not know what they were doing, or were imposed on by Meeker and Weaver, who were loyal members of the church. It was Meeker who equipped the new chapel.

The District Court's conclusion is based entirely on the fact that the arbitrators, more than a year later, arrived at a replacement value which was much higher than Weaver's earlier appraisal, and the fact that there was no proof of any value change during the intervening period.

The burden of proof to establish estoppel, however, was on the church, and it is clear that the church failed to meet its burden. It must be remembered that the arbitrators on May 3, 1967, nearly three years after Weaver's appraisal, appraised the property as of the date of the fire, June 19, 1965, and that the church did more than merely replace its old sanctuary with a comparable new one.

Mr. Weaver testified on cross-examination:

> "Q How many cubic foot are in the present edifice, approximately?
>
> "A I couldn't answer that question. I think it's bigger; yes, sir.
>
> "Q I see. And the ceilings and so forth are bigger, deeper?
>
> "A Yes. The edifice that's now standing where the old church did doesn't resemble the old church in any way shape or form.

"Q In other words, there is no comparison between the present church and the old church?

"A No, sir."

The new sanctuary was not completed and occupied until November 2, 1969.

Furthermore, if we are to indulge in drawing inferences, it is equally as probable that the arbitrators arrived at a valuation too high, as it is to infer that Weaver's appraisal was too low. But estoppel may not be established by mere inferences. We also know that opposing appraisers who testify in court do not always arrive at the same figure.

Insofar as Mr. Weaver's appraisal of the sanctuary is concerned, it was in an amount which was twice the amount of insurance previously carried on the sanctuary; and Mr. Weaver appraised the new education building at the full amount of its cost.

Section 3929.25, Ohio Revised Code, provides:

> "A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by said agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy of renewal, upon which the insurer received a premium, shall be paid."

Special Agent Weaver literally complied with this statute in making the appraisal. No estoppel can operate, therefore, against the insurer merely because it complied with the Ohio law.

The only purpose of the statute's requirement of inspection and appraisal was to fix a liability on the insurer for payment of the whole amount of the policy of insurance in case of a total loss. There the loss was only partial. The District Court held that the church was bound by the co-insurance clause except for the estoppel. There was no evidence that the church objected to Weaver's appraisal. If the church was dissatisfied with Weaver's appraisal, there was nothing to prevent it from having the structure appraised by another appraiser.

[1-3] In order to constitute equitable estoppel in Ohio, there must exist a false representation or concealment of material facts, and it must have been made with knowledge, actual or constructive, of the facts. No estoppel will arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake.[2] Fleming v. City of Steubenville, 44 Ohio App. 121, 125, 126, 184 N.E. 701 (1931); New York Central R.R. v. General Motors Corp., 182 F.Supp. 273, 286 (N.D.Ohio, 1960); 20 Ohio Jur.2d, Estoppel and Waiver, § 35.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

EDWARDS, Circuit Judge (dissenting).

The District Judge, after trying the disputed issues of fact in this case, found that appellant insurance company

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[2] The dissent bases estoppel in pais on the ground that Weaver in his appraisal made a mistake. There was no proof that Weaver had made a mistake, but even if he had, unless it was a negligent mistake there could be no estoppel in pais, Beardsley v. Foot, 14 Ohio St. 414, 416 (1863), relied on in the dissent. Nor was there any proof that Weaver was negligent.

had proposed the figure of $570,000 as the full replacement value of the property to be insured:

> "This Court finds as a fact that at that time Mr. Meeker, representing and an agent of the Insurance Company of North America, and the church agreed that in fact the '100 percent' valuation of those two buildings at that time was $570,000. The defendant 'proposed that' (Plaintiff's Exhibit 10) and proposed that value as the full one for inclusion in a 90 percent co-policy."

He also found as to the actual value at the time of loss:

> "Now, the policy contains an arbitration clause and this matter went to arbitration for the fixation of two figures; A, the value of the church, replacement value, total replacement value of the church at the time of the loss in June of 1965 or nine days after the renewal. The arbitrators found that to be $855,000. The replacement cost under the loss payment clause on page 4 of the policy was determined by the arbitrators to be $574,935.76, that being the replacement cost of the partial loss which actually took place."

He then summarized the legal problem posed by the case as follows:

> "So that Mr. Meeker for purposes of this policy was the Insurance Company of North America, and it was Mr. Meeker, we find as a fact, who suggested the insurable value which was acquiesced in and as a matter of contract was agreed on by the parties to this case in June of '64 and carried over in the renewal.
>
> "So the problem boils down to: May an insurance [20] company that agrees to the valuation on page 1 contest that valuation under a coinsurance clause on page 4?"

The District Judge then held that under the facts outlined above appellant insurance company was estopped from reliance upon the 90% coinsurance clause as a limitation on recovery under the policy.

On this record it is undisputed that the $570,000 valuation in the policy resulted from appellant insurance company's appraisal and that Meeker (who was found by the District Judge to be agent of the insurance company) represented that figure as the 100% value to the plaintiff church and told the church that it could rely on that value and that the plaintiff church did so rely in signing the contract.

As the majority opinion holds, estoppel is a doctrine which generally requires a fraudulent representation, or intentional misrepresentation with knowledge, plus reliance by the opposite party to its damage. New York Central R.R. v. General Motors Corp., 182 F.Supp. 273, 288 (N.D. Ohio 1960); 20 Ohio Jur.2d Estoppel and Waiver § 35 (1956).

What is lacking in this case, of course, is the element of willful or fraudulent misrepresentation.

The law of Ohio also recognizes a form of estoppel called "estoppel *in pais*" under which statements made in good faith may furnish grounds for estoppel.

In the leading case on this subject the Supreme Court of Ohio held:

> "Admissions *in pais*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterward gainsaying them." Beardsley v. Foot, 14 Ohio St. 414 (1863).

*See also* Union Ins. Co. of Dayton v. McGookey, 33 Ohio St. 555 (1878).

While *Beardsley* is an old case, it has recently been cited with approval by the Ohio Supreme Court. Mutual Finance Co. v. Politzer, 21 Ohio St.2d 177, 256 N.E.2d 606 (1970).

Where, as here, the access to information is substantially greater on the part of one party and that party both creates the mistake and urges the opposite party to rely thereon to its ultimate damage, I feel that Ohio law permits a court in equity to hold that the party basically responsible is estopped from taking advantage of its own mistake.

In an opinion holding an insurance company was estopped from relying upon a written condition of the policy, the Ohio Supreme Court said:

> "The tendency of many courts is to apply the principles of waiver and estoppel in a liberal manner to insurance contracts to enforce good faith and to prevent injustice and fraud where the insured has been misled by the acts of the insurer or its agents." Pannunzio v. Monumental Life Ins. Co., 168 Ohio St. 95, 106, 151 N.E.2d 545, 552 (1958).

I would affirm the judgment of the District Court.